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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 1221

FRANK MARKARIAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRANK MARKARIAN, *pro se*

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HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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IN THE

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No.

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COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Frank Markarian, prays and respectfully asks that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the Tax Court of the United States.

OPINIONS BELOW

The opinion of the Tax Court of the United States is reported in 42 TC 640. The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 352 F. 2d 870. The above opinion, together with its order denying rehearing en banc and the dissenting opinion of Judge Schnackenberg for granting rehearing, is inserted in the Appendix of this Document.

JURISDICTION

The judgment of the Court of Appeals was entered on October 22, 1965. A petition for rehearing en banc was denied by a split decision on November 16, 1965. The opinion of dissenting Judge Elmer Schnackenberg on granting rehearing en banc was issued on November 29, 1965. The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1). (On February 11, 1966, The Hon. Tom C. Clark, Associate Justice of this Court, granted 60-day extension of time.)

QUESTIONS PRESENTED

1. Whether Congress intended the term "support" to be applied in broader and liberal sense in Section 152 of Internal Revenue Code of 1954.

2. Whether personal service rendered to an *invalid* dependent can be considered at its equivalent market value when computing the support test for such a person for exemption purposes.

3. Whether there is discrimination in allowing personal services to anyone when paid for, but disallowing similar services at fair market value when rendered to an afflicted dependent.

4. Whether the Treasury Department's regulations and interpretations in question are arbitrary and unfair and capricious.

5. Whether giving the benefit of doubt in the tax statutes and regulations to the Respondent was contrary to the well-established court rule and policy.

6. Whether there is consistency in principle and practice to allow market value for lodging for anyone, while market value for personal service rendered is denied to an *incapacitated* dependent.

7. Whether the lower courts erred in giving preponderance to administrative convenience over matters of equity and justice as embodied in the remedial provisions of tax laws.

8. Whether factors involved in Bartsch v. Commissioner, 41 TC 883 are similar in kind, form and extent with those of instant case as to be treated alike.

9. Whether the well-established ability to pay principle and remedial aspect of tax laws are being applied in cases of this nature.

10. Whether the proposed "Invalid Test" would be practical and easily administered.

11. Whether the adoption of Invalid Test would be in consonant with the Public Policy and Moral Law of the Land.

12. Whether the taxpayer keeping his invalid dependent at home is rendering good community service.

STATUTES AND REGULATIONS INVOLVED

Relevant Portions of Internal Revenue Code of 1954.

Section 151—Allowance of Deductions for Personal Exemptions.

(a) Allowance of Deductions,—In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income. * * * (e) Additional exemptions for dependents.—(1) In general, an exemption of $600 for each dependent (as defined in Section 152)—(a) whose gross income for the calendar year in which the taxable begins is less than $600, * * *.

Section 152. Dependent Defined—(a) General definition—For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, * * * was received from the taxpayer (or is treated under Subsection (c) as received from the taxpayer): * * *(4) The father or mother of the taxpayer * * *.

(Revenue Act of 1938, Page 130, Section 25(b)(2).)

Credit for dependent—"incapable of self-support because *mentally or physically defective.*"

Treasury Regulation T.D. 6231, 1957-1 C. B. 77, 83.

However, if the item of support furnished an individual (either by himself or others) is in the form of goods, *services* or other benefits, it will be necessary to measure the amount of such items of support in terms of its fair market value.

Treasury Department Regulation, T.D. 6304, 1958-2 C. B. 53, 54.

> For purposes of determining whether or not an individual received, for a given calendar year, over half of his support from the taxpayer, there shall be taken into account the amount of support which the individual received from all sources, including support which the individual himself supplied. The term "support" includes food, shelter, clothing, medical and dental care, education, and the like. Generally, the amount of an item of support will be the amount of expense incurred by the one furnishing such item. If the item of support furnished an individual is in the form of property or lodging, it will be necessary to measure the amount of such item of support in terms of its fair market value.

Index-Digest Supplement, IRS Publication No. 401, Page 1026.

> The regulations have been amended to require that in determining whether an individual qualifies as a dependent, items of support furnished him in the form of *services* must be measured by the amount of expenses actually incurred. If the item of support furnished an individual is in the form of property or lodging, it will be necessary to measure the amount of such item of support in terms of its fair market value.

(Regulation 101, Article 25-4, Page 132, Personal Exemption of Head of Family:—"A head of a family is an individual * * * whose right to exercise family control and provide for these dependent individuals is based upon *some moral* or legal obligation * * * .")

STATEMENT OF FACTS

The Petitioner, Frank Markarian, filed federal income tax returns for the years of 1958 and 1959. He claimed his mother as his dependent for the following reasons:

She lived with the taxpayer in his house. She had no taxable income of her own. Being a chronic invalid of many years, she depended on his support in part and on his full personal care. Her mental and physical plight was recognized by the county court by declaring her incompetent and by appointing a guardian for her.

It was stipulated and agreed for each of the two years involved it took $3160 for the actual support of the dependent. Of that amount the Petitioner contributed $1302 in actual expenditures. In addition, the taxpayer rendered personal services which were necessary and vital for his invalid mother. Such services amounted to $3600 at equivalent market value.

By adding the actual expenditures and the fair market value for household services rendered, the Petitioner had contributed far more than one half support needed to claim her as his dependent.

The Commissioner disallowed the dependency exemption by completely disregarding and overlooking the vitally needed personal services. A division of the Tax Court sustained the Commissioner. And a division of the Appeals Court affirmed the decision of the Tax Court.

At issue is personal service. Such service is recognized and allowed if a taxpayer hires anyone to provide such services for the benefit and care of anyone young or old, healthy or sick. However, if the taxpayer renders such services to his own ***invalid and helpless*** dependent, such services are disregarded even though such services might

be more effective and beneficial than if provided by a hired help.

Another important fact to be borne in mind is that household chores can be regarded as ordinary tasks if the recipient is healthy or normal. But if such services are rendered to an invalid or a disabled person, they become necessary and vital for the very existence of such a recipient.

In the Bartsch case (P. 887) the Commissioner and the Tax Court regarded services to be in the nature of ordinary type. Whereas in Markarian case, such services were necessary and vital by virtue of the physical and mental disability of the dependent.

REASONS FOR GRANTING THE WRIT

The decision of lower court does not conform with the intent of Congress; it runs counter to the general objectives of the Executive Department; and it is at cross-purpose of our Public Policy and Moral Law of the Land. (See Regulation 101, Article 25-4, Page 132.)

This being a precedental case, thousands of duly recognized invalids of one kind or another and their guardians will be spared of excessively unjust taxation if the erroneous decision of lower court is reversed. Public interest and importance inherent and obvious in this case deem it advisable and meritorious for a Supreme Court review.

The monetary consideration involved is of no consequence, but the principles, the ethics and morality involved will take second to none. Why, our very own professed and vaunted virtues of mind and magnanimity of heart are at stake in this case.

Congress did not define the term "support." "In enacting legislation, Congress is not engaged in a scientific process which takes account of every contingency." N. Y. University Law Review, Vol. 29, Page 1181.

Though Congress has left up to the Treasury Department and to the Tax Court to construe and construct the statute liberally for the benefit of the taxpayer (Dumbar v. Com., 119 F. 2d 367, Page 369) they did not do this in this case.

To an invalid person, what good is food unless someone prepares and serves it? To an invalid person, what good is shelter unless someone maintains it? To an invalid person, what good is clothing unless someone buys and cares them?

To a chronic, mentally sick person, all necessary material items at her beck and call may well be of no avail unless there is also the presence of a relative who cares. This statement conforms with this Biblical passage: "It is written, That man shall not live by bread alone * * * ." Luke 4:4.

"Dependency under the definition goes further than economic convenience; it speaks in terms of people incapable of supporting themselves because of infancy, senility, mental incompetence, physical incompetence and like or similar circumstances." Judge Arnold in Hoskins v. Com., 42 BTA 117, 120. (See also Revenue Act of 1938, Page 130, Section 25(b)(2).)

On Page 1026 of Index-Digest Supplement of IRS Publication No. 401 it is stated: "The regulations have been amended to require that in determining whether an individual qualifies as a dependent, items of support furnished him in the form of *services* must be measured by the amount of expenses actually incurred. If the item

of support furnished an individual is in the form of property or lodging, it will be necessary to measure the amount of such item of support in terms of its fair market value."

The above regulation spells out the unfair and discriminatory nature to those who can not afford to hire outside help. This is borne out by the dissenting opinion of Judge Fisher in Bartsch, 41 T.C. 883, 888.

"To my mind, it is inconsistent in principle to allow the fair market value of lodging furnished an individual, but not the fair market value of related household services in determining the support provided the same individual.

"In addition I feel that the majority view tends to *discriminate* in favor of those who can afford to hire the services of others over the not-so-fortunate who can only provide time and effect and are thereby forced personally to provide the needed services."

Treasury Department Regulations 6231 and 6304 as related to personal services serve to emphasize the clear-cut arbitrariness and capriciousness and discriminatory practice resorted to by those charged to interpret and administer tax statutes for their own convenience.

How can anyone reconcile in saying that those two divergent regulations are in consonant with the appertained tax statute?

In one we are instructed that "goods, services or other benefits" can be valued in terms of its fair market value. But in next regulation we are told by the same persons to forget what was said before and remember that only property or lodging is to be valued in terms of its fair market value.

Does it make sense to anyone to have a regulation which permits lodging provided to a normal dependent be valued at its equivalent market value, but prohibits in determining market value for services rendered to an incapacitated dependent? Here is an instance where property value is recognized in ordinary cases, but human value is completely ignored and rejected despite the presence of dire and unfortunate elements.

Petitioner's remarks in pointing out the misjudgment of some officers of IRS is borne out by former Commissioner Mortimer Caplin. Here are some of the phrases he used in a Memo to his agents: "Be reasonable" to the taxpayers. "Not to adopt a strained construction" of the law. Not to raise issues "arbitrarily." Tax code "should be administered with * * * largeness of attitude * * * *." See U. S. News & World Report, May 18, 1964, Page 96.

The Respondent admits there is before us an "ambiguous or doubtful statute," and the Tax Court admits about the "equivocal regulatory history." But neither of them gave the benefit of doubt the Petitioners in Bartsch and Markarian cases were entitled by the well-established rule and policy of the courts as Associate Justice Van Orsdel points out in Dempster v. Commissioner, 46 F. 2d 604, Page 606:

"The rules of evidence in a hearing before the Tax Court are not different from those applied to civil procedure in the courts, except that the *statutes and regulations should be construed liberally in favor of the taxpayer.*"

In Frankel v. United States, 192 F. Supp. 776, 777 it is also pointed out that doubt or ambiguity in tax laws and regulations is to be resolved in favor of taxpayers.

Despite IRS Regulation 118, Section 39.25-2 in which it was specifically stated that "the fair rental value of a house owned by a taxpayer in which lodging is furnished to a dependent parent * * * may *not* be taken into account in determining whether over half of that parent's support was furnished by the taxpayer," the great 1955 Tax Court rightly ruled that that regulation properly interpreted would measure support directly from cash outlay or *indirectly from other sources,* including the equivalent fair rental value for the room furnished. Blarek v. Commissioner, 23 T.C. 1037.

Based on the equivalent fair market value concept advanced and established by the 1955 Tax Court, IRS through the Treasury Department modified and adopted in 1957 its Regulation T.D. 6231 wherein in broadest sense "goods, services or other benefits" could be valued at its fair market value.

But because some others in categories, not in the least related to issues in Bartsch case and in this instant matter, were taking undue advantage of the regulation, rather than limiting "services" to deserving class of people as here, it arbitrary and unfairly removed it in its entirety the following year. (See T.D. 6304.) Such an action was inconsistent and counter to the principle of fair market value concept enunciated by the 1955 Tax Court.

The Appeals Court states that (P. 873) "It is true that the present regulation *contains elements of unfairness.* For example, those who can afford to or do pay for the care of a dependent may include their expenses in computing the support furnished, while those who because of necessity or for other reasons, personally furnish identical services may not include the fair market value of such services. This unfairness, however, must be balanced

against the difficulty * * * of determining fairly the value of such services * * *. We think, with some reluctance, that administrative exigencies tip the scales in favor of the present regulation."

Judge Schnackenberg in his dissenting opinion stated thus in part: (P. 874) "However I cannot agree that any court is justified in saying to such a taxpayer as Petitioner herein that such infairness must be balanced against the difficulty which besets the government in imposing a tax in the circumstances * * *. The government has assumed the burden of imposing a tax in this case and *it has no right to be unfair* to the taxpayer because to be fair presents a very difficult problem."

Please note. If administrative convenience herein is to prevail against equity and justice embodied in the remedial provision of a tax law or regulation, those charged to administer our tax laws will always plead as such in disputed cases whether or not there should be any justification for such an argument.

The Petitioner's emphasis as to why the principles of equity and justice be given preponderant weight is borne out by this statement from Justice Black: "Rules of practice and procedure are devised *to promote the ends of justice,* not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifices of the rules of fundamental justice." Hormel v. Commissioner, 312 U.S. 552, 557.

Anyhow, there are many, many IRS regulations which are far, far more difficult and complex than an adoption

of a workable formula to resolve properly herein issue. In reality, under the proposed "Invalid Test" to be explained later, one would encounter no difficulty to administer, let alone to face so-called "administrative exigencies." In fact, to calculate the fair market value for personal services rendered would be *much easier* than that allowed and done for lodging furnished a dependent.

When the Bartsch case was being adjudicated by the Tax Court, household chores rendered by the daughter to her mother was regarded by that court to be "ordinary," not so necessary as was in Markarian case. For anyone to indicate later otherwise would not conform with the actual facts.

Markarian case is distinguishable and different in principle and extent and objective from the Bartsch case as to warrant opposite finding and decision.

In Bartsch case the dependent showed signs of infirmity due to general aging. That is a natural process. It is a normal case. But the dependent in Markarian case was invalid both physically and mentally as early as twenty-five years before the years in question. Her chronic plight was duly recognized by the medical profession. The county court had declared her incompetent and had appointed a guardian for her.

To an invalid mother without benefit of common sense and ordinary intelligence as was in this case, simple household tasks performed by the Petitioner *assume new dimensions and meaning.* They become vital for her very existence day by day. Here there was no semblance of reciprocity of service as there was to some extent in the Bartsch case.

Our income tax laws are based on the ability-to-pay principle. Another fundamental aspect of our tax laws

is their remedial provisions. Latter statement encompasses such as allowance of exemptions on number of dependents, double exemptions to the aged and blind, special treatment and allowance for child-care expenses incurred by working mothers.

But alas, IRS does not apply neither the ability-to-pay principle nor the remedial tenet as related in cases of this nature. In fact, the poor and the unfortunate are taxed more for being as such. It makes no sense. It runs counter to the intent of Congress. It infringes Public Policy and Moral Law of the Land.

If clarification and emphasis are needed that personal services rendered to one's invalid dependent is a part of support, to IRS Document No. 5013 it can be added the "Invalid Test" to those five other types of "tests" required for anyone to claim a dependent as an exemption. If desirable, the Invalid Test can be treated in a separate section of that Document as it is done for blindness.

Here are the elements of the Invalid Test: In addition to the usual requirements—support test, gross income test, relationship test, residency test, joint return test—for claiming an exemption, one must meet the *proof of disability or invalid test.*

To compute the fair market value or its expense equivalent of services rendered to an invalid dependent, the national minimum hourly rate as stated in the "Fair Labor Standard Act" may be applied. The rate for the years in question was one dollar an hour. The number of hours the taxpeyer or his family shall have contributed in the care of the invalid dependent would have to be relied on the legitimate accuracy and veracity of the taxpayer. The fact that the dependent is an *invalid,* it becomes self-evident that he or she must rely on the personal services of the entire household.

Unlike dissimilarity and variation in the fair market value of lodging which is recognized by IRS and by the Tax Court, the fair market value or its expense equivalent of personal services rendered for the invalid dependent will be uniform nationwide. This would be decidedly easier and more practical to determine and administer than already done for lodging.

The adoption of the Invalid Test or the interpretation of existing statutes and regulations to comprise elements of Invalid Test would be in consontant with the Public Policy and Moral Law of this Nation, judging from grants given by the federal government to states for health and medical centers to combat mental retardation and diseases. See U.S.C. 42, Sections 1391 and 1394 and Sections 2661 to 2696. Grants are also made available for states to help their aged, blind and disabled persons. These are governed under Sections 1381 to 1385 of the United States Code, Title 42.

The war on poverty, granting of medicare under social security, aid to depressed areas and other special treatments granted or made available to the aged, to the disabled and to the unfortunate spell out what the National Public Policy is under our Moral and Legal Laws. All these point out the desirability of having liberal and broad construction and interpretation of our tax statutes and regulations.

In the absence of legislative laws, it becomes necessary for the Judiciary branch of the Federal Government *to advance principles and rules* consistent with the basic statutes on the books. *Court decisions are another form of laws.* See Foundation of Modern Jurisprudence by William S. Carpenter.

The government encourages contributions to medical, educational and charitable institutions by allowing donors to deduct such contributions as tax deductible items. Same principle and same desirable results are embodied when a taxpayer renders personal services to an invalid dependent kept at home. In so doing, the taxpayer performs public service because an invalid confined at home imposes no community burden.

Yes, by taking care of his mother, the Petitioner has rendered good community service. He has prevented his mother from becoming a public charge. Thus, directly and indirectly he has helped the government. The government should be big enough to reciprocate for this good example.

CONCLUSION

Unless changed or reversed, the opinions expressed by lower courts include all types of invalids — paraplegics, paralytics, mental cases and all others who are dependent on their relatives for ordinary household chores — the adverse import and impact of Markarian case as it stands now far exceeds and transcends that of Bartsch case.

There are enough doubt, ambiguity and discrimination against the poor and the hapless in the Respondent's regulations and the opinions of the lower courts are so erroneous, the Supreme Court of the United States has the unique opportunity to render great and humane service to this Nation and its people by either asserting that services rendered to one's invalid dependent can be regarded as an element of support expressed at its market value or by directing that the Invalid Test be incorpo-

rated with its related regulation as the 1955 Tax Court ordered the Respondent to do with reference to lodging.

For the foregoing reasons and under the circumstances, this Petition for Certiorari should be granted.

Respectfully and sincerely submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965 — SEPTEMBER SESSION, 1965

No. 14,937
FRANK MARKARIAN,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of the Tax Court of the United States

Argued September 29, 1965
Decided October 22, 1965

Before DUFFY, KNOCH, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This appeal presents a construction of sections 151 and 152 of the Internal Revenue Code of 1954[1] and Treasury regulations issued thereun-

[1] Pertinent Portions of Int. Rev. Code of 1954, §§ 151-2 read:

SEC. 151. ALLOWANCE OF DEDUCTIONS FOR PERSONAL EXEMPTIONS.

(a) *Allowance of Deductions.*—In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income. * * *

(e) *Additional Exemption for Dependents.*—(1) *In general.*—An exemption of $600 for each dependent (as defined in section 152)—

(A) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than $600, . . .

SEC. 152. DEPENDENT DEFINED.

(a) *General Definition.*—For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) as received from the taxpayer): * * *

(4) The father or mother of the taxpayer. . . .

der. The question is whether the value of personal services rendered by a son to an aged mother, residing with him, is includible as an item of support under section 152. The section allows an exemption for a dependent, over one-half of whose support has been supplied by the taxpayer. The Commissioner of Internal Revenue determined that taxpayer Frank Markarian was not entitled to a dependency exemption for his mother for the taxable years 1958 and 1959 and assessed deficiencies in the respective amounts of $143.51 and $123. The Tax Court sustained the action of the Commissioner. The taxpayer then filed the instant petition for review. The Tax Court's decision is reported at 42 T.C. No. 44 (June 24, 1964).

The facts, stipulated in the Tax Court, are here summarized. During the years in question the taxpayer's mother, Gullu Markarian, lived in her son's home. She suffered from mental and physical illness. The taxpayer claimed his mother as a dependent in his income tax returns for both years. In computing the total support for his mother, the taxpayer added to his actual expenditures amounts for personal services rendered to her. It was stipulated that if the Tax Court decided that the value of these services may not be included in the amount of claimed support, then the taxpayer failed to contribute over one-half the total support of his claimed dependent.

The Tax Court held against the taxpayer, citing *Bartsch* v. *Commissioner,* 41 T.C. 883 (1964). The court stated that the two cases are legally indistinguishable. The taxpayer attempts to distinguish *Bartsch* on the ground that there the taxpayer's mother was old and infirm while here taxpayer's mother was a complete invalid. We agree with the Tax Court that even though the stipulated facts are sufficient to warrant a conclusion that Mrs. Markarian was a total invalid, this would not

distinguish in principle the present case from *Bartsch*. In both cases the services rendered by the taxpayer were necessary.

The Commissioner in the instant case made his determination in accordance with a Treasury regulation promulgated to implement section 152 of the Code.[2] This regulation, as we interpret it, defines support as including only actual expenditures plus the fair market value of property and lodging if the support includes such items. By implication it excludes the value of person services furnished the dependent for which no money has been expended. The taxpayer contends that the regulation is unreasonable in that it discriminates between classes of taxpayers and between types of support, and therefore is invalid. His contention is supported by the dissent in *Bartsch* of two judges of the Tax Court.

The current regulation, promulgated August 22, 1958, amended a prior regulation adopted April 25, 1957. The prior regulation, T.D. 6231, 1957-1 Cum. Bull. 77, 83, provided in pertinent part:

> However, if the item of support furnished an individual (either by himself or others) is in the form of goods, *services,* or other benefits, it will be neces-

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[2] Treas. Reg. § 1.521-1(a)(2)(i)(1957), as amended, T.D. 6304, 1958-2 CUM. BULL. 53, 54, reads:

For purposes of determining whether or not an individual received, for a given calendar year, over half of his support from the taxpayer, there shall be taken into account the amount of support received from the taxpayer as compared to the entire amount of support which the individual received from all sources, including support which the individual himself supplied. The term "support" includes food, shelter, clothing, medical and dental care, education, and the like. Generally, the amount of an item of support will be the amount of expense incurred by the one furnishing such item. If the item of support furnished an individual is in the form of property or lodging, it will be necessary to measure the amount of such item of support in terms of its fair market value.

sary to measure the amount of such items of support in terms of its fair market value. (Emphasis added.)

The Treasury deemed the 1958 amendment necessary for important administrative reasons. The circumstances under which the regulation was modified are disclosed in a statement made by the Commissioner before the Tax Court. We deem the statement germane to our discussion and therefore place the substance of it in a footnote.[3] The statement demonstrates the difficulties encountered in administering the 1957 regulation. It shows the virtual impossibility both in arriving at a proper value for support furnished in the form of services and also in deciding whether or not such services

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[3] The Commissioner's statement reads:

Under the 1939 Code, support which an individual received from a taxpayer was measured by the amount of expense incurred by the taxpayer furnishing such support. This "actual expense" rule was contained in Regulations promulgated under the 1939 Code. Treasury Regulations 118, Section 39.25-2. But two 1955 Tax Court decisions under the 1939 Code Regulations (*Blarek* v. *Commissioner*, 23 T.C. 1037; *Haynes* v. *Commissioner*, 23 T.C. 1046) held that the fair market value of lodging furnished a dependent must be taken into account in measuring the support of the dependent. These cases formed the basis for the initial Regulations under the 1954 Code (T.D. 6231, 1957-1 Cum. Bull. 77, 83, quoted above) which were promulgated on April 25, 1957.

In drafting the 1957 Regulations (subsequent to the *Blarek* and *Haynes* decisions, *supra*) it was first thought that the fair market value would be applied only in determining the value of lodging as an item of support. However, in the course of administrative consideration, it was decided that such a rule placed too narrow an interpretation upon the principles of *Blarek* and *Haynes*. Thus, the words "goods, services, or other benefits" were decided upon in order to include within the fair market value not only lodging and other property furnished in kind, but also services.

After these Regulations were in effect for less than one year, it became apparent to the Commissioner that the extension of the fair market value concept of the *Blarek* and *Haynes* decisions to "services, or other benefits" was too broad, producing results which were neither contemplated or intended. Neither of these decisions re-

constitute support. Hence, according to the Commissioner, it was necessary to amend the regulation.

It is true that the present regulation contains elements of unfairness. For example, those who can afford to or do pay for the care of a dependent may include their expenses in computing the support furnished, while those who, because of necessity or for other reasons, personally furnish identical services may not include the fair market value of such services. This unfairness, however, must be balanced against the difficulty, if not the impossibility, of determining fairly the value of such services and of deciding what services constitute support. We think, with some reluctance, that administrative exigencies tip the

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([3] Continued)
quired a rule under which the fair market value of services furnished a dependent should be a factor in determining support.

During the period in which the fair market value of services was includible as an item of support under the Regulations, the Internal Revenue Service was flooded with inquiries with respect to the interpretation of this phrase. The most common inquiry was made in cases of divorced parents where the mother was awarded custody of the child and the father furnished all of the cash necessary for the child's support. The mother naturally took the position that she was entitled to the dependency exemption by virtue of the services she contributed to the child, irrespective of the cash contributed by the father. Both taxpayers and the Service faced the obvious difficulty of attempting to value personal services of this nature. This was especially true in attempting to make the necessary computation of the value of services such as bathing, dressing and other acts performed by the dependent on his own behalf.

The Regulations providing for the valuation of services proved extremely difficult to administer. It was virtually impossible to arrive at a proper value for support furnished in the form of services or to determine in every case whether or not such services constitute support. It was therefore necessary to amend the Regulations to the present wording which limits the application of fair market value to items of support in the form of property or lodging. Thus the current Regulations eliminate the necessity of determining the fair market value of support furnished an individual in the form of services by allowing only the actual expense incurred or any services provided.

scales in favor of the present regulation. No tax measure, we suppose, can ever be written that, when considered in all its facets, is completely fair to all. An approximation is all that can be hoped for; an accommodation to other requirements is to be expected. As the Tax Court said in the *Bartsch* decision: [T]axation is a practical matter. To hold . . . otherwise than we have [in disallowing the value of personal services], would be incredibly impractical."

Section 152 does not define the term "support." The Treasury, as we have seen, has taken a pragmatic approach in interpreting it in the regulation. The question remains: Is there a logical basis stemming from the Code which permits the current regulation to exclude the value of personal services in computing "support" furnished a dependent? We think there is such a basis. In that respect we are in agreement with what the Tax Court said in *Bartsch*:

> The term "support" in the Code must mean something more than furnishing the ordinary kindness and helpfulness and the cooking and the cleaning and the dishwashing that one able member of a household furnishes another less able. These things are not to be valued in the market for tax purposes. Support, as defined in the regulation, includes items such as food, shelter, etc., of which the amount will be "the amount of expense incurred by the one furnishing such item."

The taxpayer argues that an "invalid test" should be substituted for the current regulation whenever a taxpayer furnishes all household services to a dependent who is mentally or physically helpless. Even in such circumstances, however, we must consider the difficulty in applying such a test as well as the impracticality

in determining the value of the services rendered. Furthermore, it is not within the province of the courts to revise Treasury regulations by the decisional process unless there is a clear statutory justification. As the Tax Court said in *Bartsch,* "We find nothing in the statute requiring that such services as taxpayer rendered to her mother are to be 'valued' in computing the 'support' which she furnished her mother for dependency exemption purposes."

The decision of the Tax Court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

219 South Dearborn St.
Chicago, Illinois 60604

Tuesday, November 16, 1965

Before

Hon. JOHN S. HASTINGS, Chief Judge
Hon. F. RYAN DUFFY, Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge

No. 14937

FRANK MARKARIAN,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for review of a decision of the Tax Court of the United States.

IT IS ORDERED by the Court that the petition for a rehearing *en banc* be, and the same is hereby DENIED.

(Judge Schnackenberg voted to grant the rehearing *en banc*).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14937

FRANK MARKARIAN, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE.

November 29, 1965

CIRCUIT JUDGE SCHNACKENBERG, on petitioner's request for a rehearing *en banc*:

The opinion of Judge Swygert candidly recognizes the elements of unfairness in the treasury department regulation about which petitioner complains in his petition for rehearing *en banc*. However I cannot agree that any court is justified in saying to such a taxpayer as petitioner herein that such unfairness must be balanced against the difficulty which besets the government in imposing a tax in the circumstances. That difficulty is assumed to involve a fair determination of the value of the services which he rendered to his aged mother who resided with him. The government has assumed the burden of imposing a tax in this case and it has no right to be unfair to the taxpayer because to be fair presents a very difficult problem. If a step in the imposition of a tax is unfair, it cannot be justified on the ground that the government cannot ascertain a fair way to meet its objective.

I reach the same result as the dissenting judges on the Tax Court.

For these reasons I vote to grant petitioner's request for a rehearing *en banc*.

A true Copy:

Teste: .....

Clerk of the United States Court of Appeals for the Seventh Circuit.

MOTION FILED
MAY 12 1966

MOTION FOR LEAVE TO FILE

No. 1221-A

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

FRANK MARKARIAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SUPPLEMENTARY PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRANK MARKARIAN, *pro se*
636 Park Avenue
South Milwaukee,
Wisconsin 53172

HANNERSMITH-KORTMEYER CO. MILWAUKEE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 1221-A

FRANK MARKARIAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION FOR LEAVE TO FILE SUPPLEMENTARY PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully moves this Court for leave to file the annexed SUPPLEMENTARY PETITION for Writ of Certiorari under Section 1254(1) of Title 28 of the United States Code.

STATEMENT IN SUPPORT OF MOTION

For the sake of justice and nobility embodied and inherent in this instant case and in conformance with the magnanimity of this Court, the Petitioner seeks your understanding and indulgence to overlook lack of precise formality and to accede in the protraction of work occasioned by want of legal knowledge and training and experience of the Petitioner whose financial dearth compels him to represent self.

The Petitioner had some justification in his assumption that the Brief in Opposition would not be filed here because the Respondent offered no detailed opposition when the Petitioner sought rehearing before the Court of Appeals. Then, too, the Petitioner relied on the wisdom of the Respondent not to try to hinder a Supreme Court determination on this reviewable case.

Now that the issue is being contested at the very offset, it is important that this Court be adequately informed of all its essential elements. The situation now calls for amplification so that you can arrive at a fair and just decision.

The Supplementary Petition contains some vital points and pertinent cases not mentioned at all in the regular Petition. Here one or more pivotal points underscored and challenged were merely mentioned in the Petition for the sake of brevity that the Certiorari would be granted without challenge from the Respondent.

The decision of the Court of Appeals, like that of the Tax Court, is not in accordance with the tax statute of Section 152. It is in conflict with the true intent of the Law. It is an abuse of discretion. Contrary to soundly established policy and rule, it is too narrowly constructed

and interpreted for the benefit and convenience of the Respondent. In such cases, Writ of Certiorari ought to be granted as was done in *C.I.R. v. LoBue,* 351 U.S. 243, 246.

By granting permission to file the Supplementary Petition, you would *not* place the Respondent at a disadvantage because he still will have had twelve days to file his Brief in Opposition before the due date of May 16. (Both the Counsel of Respondent and the Solicitor General had copies of this Supplementary Petition in their hands on May 4, 1966.)

In view of recurring nature of the principal question, and in view of public need for its proper administration, it is well for the Supreme Court to determine the full scope and meaning of Section 152. Such a determination would harmonize with the following famous quotation:

> "Whatever may be the limitations which trammel inquiry elsewhere, we believe that the great State University of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone the Truth can be found." (Board of Regents of 1894)

Wherefore, for the foregoing reasons, the Petitioner earnestly prays that an order be entered granting leave to file the annexed Supplementary Petition.

Respectfully submitted,

Frank Markarian

FRANK MARKARIAN, *pro se*

Dated as of May 4, 1966.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 1221-A

FRANK MARKARIAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SUPPLEMENTARY PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Knowing how busy the Supreme Court of the United States is and having initially assumed that the Respondent would not oppose this Certiorari, the Petitioner prepared his Petition concisely. But now because it has become apparent that the Brief in Opposition would be filed, the Petitioner is deeply concerned and very zealous that the Supreme Court be better informed about more

of the basic factors related and inherent in this controversial case of wide application. Accordingly, he submits this SUPPLEMENTARY PETITION by enlarging and augmenting the REASONS FOR GRANTING THE WRIT.

Respondent and the two lower courts relied wholly on the *defective* and *erroneous* precedent set by the *Bartsch* case, 41 T.C. 883. This was explained point by point from Paragraph XIV to XLVI in the Brief of the Appellant.

Such a questionable precedent was derived from a case which had normal and ordinary factors. To stretch that decision thinly and ineffectively in an attempt to encompass this *Markarian* case, 42 T.C. 640 and 352 F. 2d 870, makes that precedent inapplicable and doubly fallacious, because the elements in this instant case are neither ordinary nor normal factors.

In both cases personal services were rendered. But that is not the deciding and pivotal point in distinguishing one case from the other. The essential point which makes the cases different and distinguishable from each other is the physical and mental condition of the dependent.

In the *Bartsch* case the dependent was becoming infirm due to aging—a natural and ordinary process. But in the *Markarian* case the dependent was chronically invalid both mentally and physically for many years. Another important point of difference was that the plight of the latter case was duly recognized and recorded by local health and judicial authorities.

The proof of disability in the "Invalid Test" is essential. Unless formally recognized at local level, a taxpayer may not be allowed the claimed exemption. Such a prac-

tice and procedure would be akin to supporting a foster child. A taxpayer who has provided the entire expense of supporting a child from an orphanage cannot claim that child as his dependent unless he had legally adopted said child.

The Respondent and the lower courts were *challenged* to point out wherein it was stated that personal services and household chores rendered were "necessary" in the *Bartsch* case. *They failed to do so,* but still persist erroneously in saying that services there were "necessary." *Nowhere in the syllabus nor in the opinion can anyone find the word "necessary" in the Bartsch case.* Please note this yourself.

In fact, by inference and by implication, personal services rendered there were treated lightly by the Tax Court. This is borne out by these offset passages:

> Taxpayer and her mother lived together in a home owned by the mother. Each performed household tasks commensurate with her physical capacities, p. 886.
>
> Do we balance our judgment of such "value" against the value of the personal satisfaction which the daughter in this case receives in giving such care, p. 886.
>
> The term "support" in the Code must mean something more than furnishing the ordinary kindness and helpfulness and the cooking and the cleaning and the dishwashing that one able member of a household furnishes another less able, p. 887.

On page 642 of the *Markarian* case the Tax Court admitted that "Our decision was *not* based on a determination of whether the services rendered to the taxpayer's mother in the *Mildred Bartsch* case were necessary. However, the inherent assumption from our opinion in that

case is that such services were sufficiently necessary to be considered as an element of support if the fair value thereof was otherwise properly to be considered a part of the support that the taxpayer furnished her mother."

There you have contradictory and illogical passages. The first part is a true statement. The latter portion is a misleading supposition because "services" were not considered to have been important and necessary enough for that particular type of dependent as to be regarded an element of support.

There are other misinterpretations of intent and facts as if deliberately designed to give substance and credulity to the opinion in the single-judge-panel of the Tax Court. Such a grievous misinterpretation was attached to the following offset paragraphs 53 and 54 of the Petitioner's Brief in Answer, p. 643:

> Mother is so peculiarly wrong—so mentally ill—that logic and reasons have little effect on her. She is so incommunicable and noncooperative that when she was confined to a hospital, the nurses were unable to improve her lot. They gave up. They suggested that we consign her to the county asylum. Had that been done, it would have been her death warrant in short time.
>
> Any question or innuendo directly or by inference that the Petitioner is helping his Mother so that he could claim her as his dependent is absolutely contrary to truth. I have no choice. Circumstances somewhat forces me. It is not filial obligation. It is more for moral reasons. The services I rendered for Mother would not be done for another person though I were paid hundred times more than I could earn from a regular employment.

The Petitioner is perplexed beyond his comprehension how any person, let alone a division of the 1964 Tax

Court could be so illogical as to say: "The import of these statements is that petitioner did gain some type of personal satisfaction from the services he rendered for his mother." Such a connotation is fallacious and uncalled-for in the light of all actual facts and conditions. The opposite is true. All the documents—all the record —of the Petitioner bear and sustain this statement of his.

The Appeals Court attached more weight to administrative ease and convenience than to the preponderant equity and justice contained herein. Its action is analogous to adhering to form but overlooking the substance of the thing.

Unless the decision of the lower court is reversed, IRS and other governmental agencies would harp and unduly emphasize about their own so-called "administrative exigencies" whenever an aggrieved citizen should seek justice from the courts. The status quo would then reign supreme.

In reality, behind all this talk about administrative difficulty there is little substance in it. The same kind of argument was used unsuccessfully in the *Blarek* case. Had there really been much substance and merit in such argument, the Commissioner would have appealed the case to a higher court after the 1955 Tax Court had ruled against him.

In truth, the Commissioner was on better footing in the *Blarek* case, 23 T.C. 1037, than he is in this instant matter. The market value for lodging could differ from house to house, from city to city, from state to state. But the market value of services rendered to invalid dependents would be uniform and same throughout the entire country. It would pose no problem to devise an

easy formula of determining its equivalent market value. The Petitioner has done so here.

It must be borne in mind, unlike the Respondent in 1957 who allowed the equivalent market value for "goods, services or other benefits" in the broadest sense to all, the Petitioner limits "services" only to *invalid* dependents. If the Respondent once deemed it advisable and feasible to allow "services" in unlimited sense to everyone, does it make sense now for him to oppose the use of services on a small scale only to the most deserving group of taxpayers?

Respondent allows personal services and household chores done on behalf of any normal and healthy person if paid for, but disallows similar services rendered to an invalid dependent. Does that makes sense? Such setup goes against the basic moral fiber of this or any other civilized country. When will our tax collectors show humane touch?

In the case of *Brehmer v. United States,* 191 F. Supp. 421, we find on page 424 this passage: "The treasury regulation, also, indicates that the statute is *not* to be given a narrow or restricted construction." In the same case on page 425 there is also this excerpt: "It is well-established law that where there is doubt or ambiguity in the interpretation of tax laws, such doubt or ambiguity shall be resolved in favor of the taxpayer."

This august Court has already pointed the right way in *Helvering (com.) v. Lazarus & Co.,* 308 U.S. 252, 255, with this statement: " * * * In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding. Congress has specifically emphasized the equitable nature of proceedings before

the Board of Tax Appeals by requiring the Board to act in accordance with the rules of evidence applicable in courts of equity * * *."

With regard to actual expense incurred through direct monetary outlay as contended by the Respondent, this is what Judge Black said in *Melat v. Com.*, 12 T.C.M. 443, 445 (Commerce Clearing House): "The parties contend we must decide what is the proper basis for measuring the support given; whether it is actual cost as contended by respondent or market value of the maintenance furnished. As we see it, under the facts presented here, we need not decide this issue for whichever standard is used our holding is the same for each taxable year."

Same concept—same principle of equivalent market value—as above was used in the famous historic case of *Blarek,* 23 T.C. 1037, 1039. The 1955 Tax Court went on to say: "If this interpretation be contrary to the regulation, then the regulation must yield to our conclusion on the law as expressed herein."

Likewise, the same general principle was used by the Tax Court in *Haynes v. Com.,* 23 T.C. 1046. What the dependents received from the taxpayer must be measured by what the dependents would have to pay on the open market.

It lends strength and meaning to the conviction that Congress intended "support" to the dependent be used in its wider application when contemplated in the light of usage by states such as these:

Under necessaries for life, *kindness* and *personal care* and *attention* are included. "The agreement to support contemplates more than mere physical necessaries, it includes kindness, personal care and attention." *Zarembski v. Zarembski,* 48 N.E. 2d 394, 399, Illinois.

"The law will construe the contract to bind defendant to give such care and attention to plaintiff as her age and infirmities demanded for her comfort." *Patterson v. Patterson,* 47 N.W. 768, 769, Iowa.

The State of Colorado has even gone farther in making it a crime for husband not to provide "care" in addition to usual food, clothing and shelter for his sick wife. *Campbell v. People,* 42 Colo. 228.

As noted before, the support statute properly interpreted in line with the intention of Congress, would include in determining amount needed for the support of a given dependent, direct cash outlay and equivalent market value for necessaries received by the dependent. "Care" in form of services rendered to an *invalid* dependent is a necessary element of support. Such services had to be provided by the taxpayer or by others. The dependent could *not* care for herself.

In the light of continuing social reforms being recommended by the Executive Department and same being enacted by Congress, it is well to become aware of those prophetic words of the Honorable Chief Justice of this Court who as Governor of California said in 1951:

> A nation that abandons its social objectives is on the road to decadence. Within the limits of our financial means every social objective of the American people must be advanced not only to relieve undue hardship and to afford equal opportunity for the good life, but also to demonstrate to an observing and critical world that our governmental and economic systems can work hand in hand in the elimination of poverty, suffering and degradation.

This subject matter is a facet of those social objectives. However, unlike other facets, neither subsidy nor grant

is sought here. We seek relief from undue and unwarranted taxation. We also seek recognition in form of respect and compassion for the maimed and the afflicted, knowing such recognition would augment our prestige here and abroad, enhance the goodwill between people and government and redound to the credit of all those having a hand in its pronouncement.

The issue focuses to this point: This *Markarian* case is sufficiently different and distinguishable from the *Bartsch* case as to warrant different treatment. There the services were regarded ordinary by the Tax Court because the dependent was not an invalid. Moreover, she had no proof of disability. Here the services were necessary and vital because the dependent had been a chronic invalid of many, many years. Her dire plight was officially noted and so recognized by medical and judicial authorities. The physical or mental condition of the dependent is the deciding factor for anyone to be considered under the Invalid Test.

All-in-all, Your Honor, this case has enough peculiar and unprecedented merit and public interest as to clearly call for exercise of this Court's eminent power to review and decide accordingly.

Respectfully submitted as before,

Frank Markarian

FRANK MARKARIAN, *pro se*
636 Park Avenue
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Wisconsin 53172

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1221

FRANK MARKARIAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Internal Revenue Code of 1954 allows a taxpayer a $600 deduction for each dependent "over half of whose support" during the tax year was furnished by the taxpayer. Code §§ 151, 152. The statute does not define the word "support," and this case involves the meaning of that word.

In his 1958 and 1959 federal income-tax returns petitioner, an accountant, claimed his mother as a dependent. During the years here in question, petitioner's mother lived with him in a house owned jointly by him and his brother. It is agreed that

217-825—66

in each of the years $3,160 in actual expenses were incurred in her support, of which petitioner contributed $1,302, *i.e.*, less than half. However, petitioner also took care of his mother, who was apparently an invalid. By calculating the fair market value of these services at $3,600 per year and adding this amount to the actual expenses he incurred, petitioner argued that he had provided more than one-half of her support. The Commissioner disallowed the claimed dependency exemption on the ground that the Regulations prohibit a taxpayer from including the value of personal services as an item of support, and the Tax Court sustained the Commissioner. The court of appeals affirmed, and a petition for rehearing, *en banc,* was denied with one dissent (Pet. A1–A9; R. 3–9).[1]

The decision below is correct, and there is no conflict of decisions or other ground for review.

1. Whether petitioner is entitled to a dependency exemption for his mother under Sections 151 and 152 of the Code depends on whether he furnished more than one-half of his mother's support, and this in turn depends upon whether he may properly assign a value for his services to her as an item of support. The pertinent Treasury Regulations define the term "support" as including the amount of expenses incurred, together with the fair market value of

[1] "R." references are to the appendix to the respondent's brief in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

property and lodging furnished by the taxpayer. See Treasury Regulations on Income Tax (1954 Code) § 1.152–1(a)(2)(i). As the court of appeals recognized, this definition was deliberately designed to exclude the value of services because of "the virtual impossibility both in arriving at a proper value for support furnished in the form of services and also in deciding whether or not such services constitute support" (Pet. A4).

Petitioner argues that the Regulations are invalid. However, it is well established that the Commissioner's Regulations are binding unless they are unreasonable. *Commissioner* v. *South Texas Co.*, 333 U.S. 496. The Regulations here in question are manifestly reasonable, in light of the extreme difficulty which the Commissioner would encounter in attempting (1) to place a value on such personal services as bathing, dressing, and caring for an aged relative or a young child, and (2) to ascertain which of such services constitute "something more than furnishing the ordinary kindnesses and helpfulness * * * that one able member of a household furnishes another less able." *Bartsch* v. *Commissioner*, 41 T.C. 883, 887.

2. There is no conflict of decisions. The only other case specifically dealing with the question presented by the instant case also held that the value of services rendered by the taxpayer to an aged mother may not be included in computing support for dependency purposes. *Bartsch* v. *Commissioner, supra.*

Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
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MELVA M. GRANEY,
HOWARD J. FELDMAN,
Attorneys.

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No. 1221-B

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

FRANK MARKARIAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF BY THE PETITIONER

FRANK MARKARIAN, *pro se*
636 Park Avenue
South Milwaukee,
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HANNERSMITH-KORTMEYER CO. MILWAUKEE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 1221-B

FRANK MARKARIAN,

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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF BY THE PETITIONER

This REPLY BRIEF BY THE PETITIONER rebuts and challenges all the contentions claimed in the Respondent's Memorandum in Opposition with new approach and with new statements not generally contained in the two preceding Documents of the Petitioner.

It seems too many attorneys for the Respondent in this and in other cases use their tricks-of-trade to win by all means. The former Commissioner Mortimer Caplin's inculation of "largeness of attitude" has not registered in some attorneys of the government.

All along by design or by simple naivety they have slurred on the principal condition—invalidism—of the dependent which gives rise and meaning to this case. Invalidism can be congenital. It can result from an accident. It may come about through biological change. Or ultimately it may result from the infirmities of old age. Young and old could become victim of it.

There was no invalidism in the *Bartsch* case. But here in this *Markarian* case the Tax Court mentioned it. The Court of Appeals also took notice of it. That is why this instant case is so different and distinguishable from that of *Bartsch* case as to impel one's sense of justice to treat it differently.

To lump together both cases because personal services were involved in each case would be to ignore the gravity of this case. That would be like hypothesizing assault and battery the same as murder because in both cases crimes were involved. From this significant standpoint the two lower courts erred.

Another irrelevant argument is the Respondent's generalization of "services" as if encompassing all types of individuals while all along the Petitioner has confined it only to invalid dependents. It is such diversion which has compelled the Petitioner to repeat his position more often than he would have liked.

Still another cliche argument drummed is about the "administrative difficulty." Such an argument might have had some merit in the *Bartsch* case where pleadings on both sides were based on generalities and where the Invalid Test was unknown. For the Respondent to use such an argument here as the principal factor would signify something seriously lacking in such a presentation.

Above statements are further substantiated by these remarks:

> You will find lawyers who want to fight cases to win when really we ought to lose them to just clarify the law. You will find *our people pressing a technical issue* sometimes when we really should not press that issue * * *.—Donald Bacon, Asst. Commissioner of Compliance Section, on Page 21 of New York University Twenty-Second Annual Institute on Federal Taxation.
>
> To state it differently, litigation reflects a pathological condition in the administrative process. It indicates that the process has broken down, and that only the courts can provide some cure under the existing statutes. — Louis Eisenstein, formerly Senior Attorney of Office of Tax Legislative Counsel in Treasury Department, Page 23 of New York University Fifteenth Annual Institute on Federal Taxation.
>
> In tax litigation I have rarely found that Treasury lawyers are particularly imbued with an intense desire to achieve a just disposition of a case * * *. Tax Administration here consists of *any argument* which a Treasury lawyer is not ashamed to make. — Attorney Louis Eisenstein in above volume, Page 38.
>
> The canons of legal ethics have a rule under which members of the bar are charged with supporting the decisions of the courts and generally speaking up affirmatively for the court position against criticism. — Dean J. Barron, Regional Commissioner of Revenue in N.Y.U. 21st Annual Institute on Federal Taxation, Page 34.

Despite the above connotation of benevolence, we have this sad condition in the Internal Revenue Service itself:

> Periodically, the Commissioner publishes a list of court decisions with which he does not "acquiesce." Short of the Supreme Court itself, no court of law from the Courts of Appeals through the Court of

> Claims, the United States District Courts and the Tax Court can escape the Commissioner's activated frown of disapproval. —
>
> Until the Commissioner decides to abandon his "non-acquiescence" either because of a change of policy or because of the sheer weight of adverse court decisions, the agents of the Internal Revenue Service will continue to ignore those edicts of courts of law which are favorable to the taxpayer. To this extent the Commissioner, for all practical purposes, stands above the courts and exercises his own judicial function. — Attorney Harry Balter in Marquette University Institute of Taxation, Vol. 9, P. 73.

Section 152 of the Internal Revenue Code of 1954 is a remedial statute. It is designed to give relief to those with dependents. Such statutes are to be construed and interpreted liberally and broadly on behalf of the taxpayers. The two lower courts and IRS failed to do so here. By restricting and confining its coverage they violated the spirit and the intent of the law.

The preceding statement is in harmony with this saying of former Commissioner of Internal Revenue Dana Latham: "Remedial statutes should be construed broadly and should be reasonably applied." Page 6 of N.Y.U. 22nd Annual Institute on Federal Taxation.

Though Congress has not defined "support," Black's Law Dictionary, 4th Edition, has done it in this manner: "Anything requisite to housing, feeding, clothing, health, proper recreation, vacation, traveling expenses, or other proper cognate purposes. *In re Vanderbilt's Estate,* 223 N.Y.S. 314, 316, 129 Misc. 605; and proper care, nursing, and medical attendance in sickness * * * ."

The limitation placed by the Respondent on the term "support" infringes and curtails the universal principle of justice. Such a restriction undermines the intent of

Congress. Such a deduction can be inferred even from this statement of Assistant Secretary of the Treasury Stanley S. Surrey in the Vital Speeches of the Day, December 15, 1965: "* * * Congress has taken a much broader approach. It has shaped our present income tax structure by giving recognition to a wide variety of these differences. * * * Congress also regards other factors, such as age * * *." Page 148.

Section 152 does not specify that direct expenses or that actual expenses incurred alone be used for items comprising the support test. Other types of expenses for necessary items valued and expressed in form of indirect expenses or equivalent market value can and should also be included.

The above statement is substantiated by the fact that the 1955 Tax Court ordered IRS to include lodging at its fair rental value, despite the presence of a regulation specifically barring such inclusion. *Blarek v. C. I. R.*, 23 T.C. 1037, and *Haynes v. C. I. R.* 1046.

If the great 1955 Tax Court could order and initiate a "new concept" of equivalent value or fair market value on an item arising indirectly and incidentally, this 1966 Supreme Court has all the right, all the power, all the inducement, all the logic, all the equity and justice to set aright the two lower courts and the Respondent by ordering services rendered to an invalid dependent be expressed at (minimum) market value as easily formalized and sampled in the Invalid Test. (See Pet. 14.)

Such a good course would be a natural extension of fair market value principle first enunciated in *Blarek* and *Haynes* cases. While the *Blarek* and *Haynes* underscore the equivalent property value, your extension would underscore the human value of the same principle of fair market value concept.

As in the *Blarek* case, the Respondent harps about the so-called "extreme difficulty" it would encounter in determining the value on services rendered to an invalid dependent. How does he know? He has not tried it. Even in 1957 when "services" were included in the regulations, he had designated no limitation whatsoever as to who could use "services." No attempt was ever made to limit services to any deserving group. Likewise, no attempt was ever made to define it, nor to formulate any sort of formula.

Such argument of administrative difficulty does not hold water nor could it withstand the illumination of light when services are limited to invalid dependents as spelled out in the proposed Invalid Test. Even without the semblance of proof at hand, the Appeals Court echoed and magnified this dubious and questionable cry of the Respondent. That lower court relied on shaky and untenable ground of "administrative difficulty" to render a wrong decision in favor of the Respondent.

IF "ADMINISTRATIVE DIFFICULTY" IS SUCH A CRUCIAL FACTOR AS CONTENDED BY THE COURT OF APPEALS AND BY THE RESPONDENT, HOW COME THE TAX COURT IN THIS CASE (42 T.C. 640) DID *NOT* MENTION IT DIRECTLY NOR INDIRECTLY ANYWHERE IN THE WHOLE CASE? Please note this truth for yourself. It all goes to prove that those two lower courts grievously erred in one way or another in their decisions against this representative taxpayer.

T. D. Regulation 6304 does not go far enough to make it fair and reasonable. Please compare these two related passages with each other:

> "Items of support furnished him in the form of services must be measured by the amount of expenses

> actually incurred. If the item of support furnished an individual is in the form of property or lodging, it will be necessary to measure the amount of such items of support in terms of its fair market value." (56 words)
>
> If the item of support furnished an individual is in the form of property or lodging or service rendered to an invalid, it will be necessary to measure the amount of such item of support in terms of its fair market value. (42 words)

The first passage represents Commissioner's own Rule 1.152-1(a)(2)(i) derived from T. D. 6304. It has two separate types of expenses—the actual on service and the equivalent fair market value on property or lodging. Here is discrimination which makes it null and void or unconstitutional.

The second passage is reconstructed by the Petitioner in such a way to to resolve properly the question in dispute. The type of expense is reduced to only one kind—the equivalent fair market value of property, lodging and services. Here we have uniformity and no discrimination as called for by the United States Constitution.

Strange as it may seem, sometimes some seemingly complicated problems have simple and just solutions. All that is needed is a combination of open mind and heart to allow the light of truth and equity and justice to penetrate.

Donations given to religious, educational and charitable organizations are tax deductible items. But contributions given to private persons and organizations are not deductible.

> The justification for exemption from taxation * * * is that these (charitable) organizations furnish the

community services that Federal, state or local government would otherwise be called upon to provide.

The exemption for religious organizations proceeds on a different premise—that they promote morality and thereby further the welfare of the state.—Jerome Hellerstein, Page 194 in Taxes, Loopholes and Morals.

Similarly, personal services rendered to an invalid dependent should be considered at its equivalent market value; while such services rendered among sound, normal and able members of a family or household be disallowed because of consideration and reciprocity inherent in latter situations.

The same philosophy behind the Public Policy of tax allowance for donations given to charitable organizations applies and controls in situations like this instant case. Had it not been for the Petitioner, the dependent would have become a public charge and liability, because she could not take care of herself, let alone attending to routine household chores.

The Petitioner's service was of exemplary nature. By caring for his Mother, he helped the community financially and morally. By giving him recognition in form of dependency allowance, the government would encourage other sons and daughters and relatives to do likewise for their own afflicted and disabled dependents.

The end result of such a desirable policy would be to lessen the influx of patients to convalescent homes, to hospitals, to governmental institutions of one kind or another. A chronic invalid would receive better care and attention and understanding among his relatives than if he is assigned elsewhere among many strangers where individuality is somewhat lost, and where the desire to live becomes dulled and meaningless.

It has now become obvious that IRS does not seem to be much concerned about the equity in this case and in its appertained regulation and statute. Its chief concern seems to be for its own ease and convenience of administration. Justice and fairness are pushed into the background. For that reason, you Honorable Justices of this Supreme Court, representing nearly two hundred million people of this Country, are the Guardians and Custodians of ethics and morality, of fairness and justice, of truth and principles. May those universal virtues emerge from this case.

In sum and substance, all these concised documents—the Petition, the Supplementary Petition and this Reply Brief by the Petitioner—lead to the inescapable conclusion that the decision of the lower court is wrong and in conflict with the Congressional intent and Public Policy, that it is wrong and in conflict with the Moral Laws of God and of man, that it is wrong and in conflict with the welfare and dignity of the taxpayer and that of the dependent.

The enormity of grievances attendant to this and similar cases call for not only the granting of this Writ of Certiorari, but better yet reversing summarily the decision below without the benefit of further written and oral arguments. Thank you.

Respecfully and gratefully submitted,

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